Supreme Court, U.S.
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No. 94-298

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

DAVID PORTER,

Petitioner,

v.

UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA-UAW; ROY HERNANDEZ; and JOHNSON CONTROLS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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UAW AND HERNANDEZ RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER STATEMENT OF THE FACTS

At all times, Petitioner David Porter was employed at Johnson Controls, Inc. (the "Employer"), and represented for purposes of collective bargaining by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (the "UAW") and its Local 119 (the "Local").

It was the employer's usual practice, pursuant to the collective bargaining agreement, to identify the employee who would be required to work overtime a week in advance.[1]

Accordingly, Porter was notified a week in advance that if anyone was needed to work overtime, he was the "low man." (Pet. App. 12-13).

At approximately 2:00 p.m. on May 29, 1990, Glenda Locke, Porter's co-worker on the second shift, reported to work with a doctor slip stating that she could not work on her regular job because it required lifting. Consequently, it was necessary for Porter's supervisor, Allen Arnold, to find a first shift operator willing to work four (4) hours of overtime. He asked for volunteers to stay but no one was willing to stay. Arnold then confirmed

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[1] The collective bargaining agreement at Article IV, Section 3 provides in pertinent part:

"Section 3. Overtime Equalization.

(a) When a department is scheduled to work overtime, overtime opportunity hours will be distributed as evenly as practical among those employees in the department, on the shift, permanently performing the job. These employees will have the first opportunity for overtime. After the above is exhausted, employees in the department who are qualified will have the option by seniority. If no one volunteers as stated above, the employee permanently performing the job with the lowest overtime hours may be required to work, providing a disparity as indicated in Article IV, Section 5(c) does not occur.

(b) When overtime is required, notice will be given as soon as practical and no later than noon for daily overtime and 8:00 p.m. Wednesday for Saturday overtime except in circumstances beyond the control of the Company. This commitment shall not be construed to permit the employee(s) with the fewest overtime hours to refuse to work daily overtime when required due to absenteeism. Individual problems regarding required overtime will be given consideration."

(Pet. App. 13).

that Porter had the fewest overtime hours and instructed him to stay and work four (4) hours of overtime on the second shift because of Ms. Locke's absence. Porter refused to stay and stated that he had to pick up his son after school. Arnold reminded Porter that he was the operator with the fewest overtime hours and that pursuant to Article IV, Section 3 of the Collective Bargaining Agreement, he was required to stay and work overtime.

Nevertheless, Porter refused Arnold's direct order to stay and work overtime and left the facility when his shift was over at 2:45 p.m. (Pet. App. 12)

Porter was discharged for insubordination for refusing Arnold's direct order to work overtime.[2] The Local submitted a grievance in protest of the discharge pursuant to the grievance procedure in the collective bargaining agreement and processed it at step two, the step at which grievances regarding discharges are initiated. At step three in the procedure, the International Union representative assigned to the facility is included in the process. Here, that individual was Defendant Roy Hernandez. Accordingly, Hernandez attended the step three meeting concerning Porter's discharge. There he heard the employer's version of the facts leading to the decision to discharge, and learned that Porter had received many prior disciplinary notices for alleged violations of work rules. Before the step three meeting, Hernandez had reviewed the grievance and the collective bargaining agreement and talked with Local Union Bargaining Committee Chairman Mike Cross, the other bargaining committee members and Porter's co-workers to learn what Porter's version of the facts were.

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[2] Porter was found to have violated Johnson Controls' Intolerable Rule 6, which prohibits the "refusal to obey a reasonable instruction of any supervisor." Intolerable Rules Infractions, Johnson Controls MSF Ex. 1. The penalty for violating the rule is "immediate discharge upon the first offense unless there are moderating circumstances which, in the Company's discretion, allow a lesser penalty." (Pet. App. 5 n.3)

After the step three meeting, Hernandez consulted with other members of the International Union staff in order to evaluate the merits of the greivance. Hernandez negotiated a settlement with the employer whereby Porter would have been reinstated to employment with a probationary period but without back pay. Based on his investigation and his experience, Hernandez believed that he would not have obtained a better result at arbitration. When Porter refused the offer, the employer withdrew it. (Pet. App. 5 and 6)

Porter admitted in his deposition that on October 17, 1990, Hernandez informed him that the grievance would not be submitted to arbitration because Hernandez, the individual who would have presented the case at arbitration, believed that the grievance was not winnable. During the October 17, 1990 telephone conversation with Hernandez, Porter asked him to send a letter to confirm the withdrawal of the grievance. On November 6, 1990 the letter was sent (R. 5th Cir., Vol. I, p. 115, Porter dep. 19-21 and Exhibit 2). Hernandez' decision to cancel the arbitration was not kept secret from Porter. On November 8, 1990, Porter filed an unfair labor practice charge with the National Labor Relations Board against the Union to protest Hernandez' decision to withdraw the grievance. The NLRB refused to issue a complaint because the settlement offer of reinstatement without back pay was reasonable and because there was no evidence that the UAW's decision not to arbitrate was based on any unlawful motive. Porter appealed this decision, but the charge was again refused. (Pet. App. 2 n.2) The collective bargaining agreement does not require that all grievances be presented to arbitration. (Pet. App. 6)

By 1991, the Local Union officials agreed with Hernandez' assessment of the merits of Porter's case. In February, during local contract negotiations, Local Union Bargaining Committee Chairman Mike Cross, not Hernandez, again negotiated Porter's return to work with full seniority. (R. 5th Cir., Vol. I, p. 115, Porter dep. pp.

11, 12; Exhibit 8 p. 3; R. 5th Cir., Vol. I, p. 115, Hernandez dep. 94, 95) This negotiated settlement was consistent with the UAW Constitution's requirement of Article 19, Section 2 that during contract negotiations, local union officials shall paricipate in resolving pending grievances because Cross was a local union official and he negotiated the February, 1991 settlement. (R. 5th Cir., Vol. I, p. 109)

Porter never reported to work pursuant to the agreement made in February, 1991 by Cross and Company. (R. 5th Cir., Vol. I, p. 109, Porter dep. Exhibit 8 p. 3) (R. 5th Cir., Vol. I, p. 115, Hernandez dep. 97, 98)

On April 12, 1991 Porter, through his attorney Arch Skelton, finally sent an untimely written appeal of Hernandez' October 17, 1990 decision to International Union President Owen Bieber pursuant to Article 33 of the UAW Constitution. (R. 5th Cir., Vol. I, p. 115, Porter dep. Exhibit 6) Porter did not exhaust his internal union appeals by further appealing the denial of the first level of appeals.

This action was commenced on April 10, 1992 alleging that Johnson Controls breached the collective bargaining agreement between Johnson Controls and UAW by discharging Porter and that UAW and Hernandez breached their duty of fair representation by withdrawing the grievance from arbitration. After the completion of discovery, defendants moved for summary judgment. The district court issued a written opinion granting both motions and dismissed the case. The district judge held that, "Based on the record, it does not appear that Hernandez's decision to forego arbitration was so far outside a wide range of reasonableness as to be irrational." (Pet. App. 6-7)

Furthermore, the district judge ruled that, "UAW's and Hernandez's representation of Porter in connection with his grievance was neither arbitrary, discriminatory nor in bad faith. The decision not to invoke arbitration after evaluating the merits of Porter's grievance constituted a

permissible exercise of the Union's discretion." (Pet. App. 9)

As to the employer's motion, the district court judge held, "the record shows that the order to Porter to work overtime on May 29, 1990 was not unreasonable" and that "Johnson Controls did not violate the CBA when it ordered Porter to work overtime on May 29, 1990." (Pet. App. 12 and 14)

The Fifth Circuit affirmed the district court and denied petitioner's Petition for Rehearing and Suggestion for Rehearing and Suggestion for Rehearing En Banc in Per Curiam decisions.

REASONS FOR DENYING THE WRIT

I. THE FIFTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT

Petitioner contends that the district court erred in evaluating defendant's conduct by the standard established in *Air Line Pilots Association v. O'Neill,* 499 U.S. 65 (1991) instead of by a standard set forth in earlier cases. He further contends that the Fifth Circuit's affirmation of the appropriateness of applying the *Air Line Pilots Association v. O'Neill* standard conflicts with other circuits. Neither of these contentions are supported by the facts. Virtually every circuit applies the *Air Line Pilots Association v. O'Neill* standard to evaluate the merits of the "hybrid" Section 301 cases such as this one.[3] *Black v.*

[3] There are no published decisions on this issue from the First, Second, Third or Fourth Circuit Courts of Appeal. However, district courts in those circuits have adopted the *Air Line Pilots Association v. O'Neill* standard in *Dunlap v. United Transportation Union,* 826 F. Supp. 957 (E.D. Va. 1992); *Johnson v. United Steelworkers of America,* 843 F. Supp. 944 (M.D. Pa. 1994); *Lewis v. Tuscan Dairy Farms, Inc.,* 829 F. Supp. 665 (S.D.N.Y. 1993) and *Abrams v. Communications Workers of America,* 818 F. Supp. 393 (D.D.C. 1993).

Ryder/P.I.E. Nationwide, Inc., 15 F.3d 573 (6th Cir. 1994); *Linton v. United Parcel Service*, 15 F.3d 1365 (6th Cir. 1994); *Nida v. Plant Protection Association National*, 7 F.3d 522 (6th Cir. 1993); *Souter v. International Union, UAW*, 933 F.2d 595 (7th Cir. 1993); *Fraz v. Omaha World Herald Company*, 960 F.2d 1370 (8th Cir. 1992); *Marino v. Writers Guild of America, East, Inc.*, 992 F.2d 1480 (9th Cir. 1993); *Aguinaga v. United Food and Commercial Workers International Union*, 993 F.2d 1463 (10th Cir. 1993); and *Cox v. Administrator United States Steel and Carnegie*, 17 F.3d 1386 (11th Cir. 1994). Hence, Petitioner's contention is incorrect.

II. THE FIFTH CIRCUIT'S DECISION DOES NOT SANCTION A DEPARTURE FROM THE LAW

Petitioner's argument that the district court misapplied the law and made erroneous determinations of material disputed facts is incorrect. The record shows that the district court applied the standards for evaluating motions for summary judgment enunciated in *Matsushita Electric Industries Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). (R. 5th Cir., Vol. I, p. 115)

These cases vest the district court with the discretion with which to, *inter alia*, determine whether a party has failed to make a showing sufficient to establish the existence of an element essential to his case and on which that party will bear the burden of proof at trial and, if not, to enter a summary judgment against that party. *Celotex Corp. v. Catrett, supra.*

In the case at bar, Arnold's affidavit was uncontradicted. Arnold's affidavit established that the employer notified Porter of the need for him to work overtime as soon as the need was known, and that Porter disobeyed a direct order to work overtime. Porter did not produce any evi-

dence to support his argument that others who refused to work overtime were not discharged by the employer. Porter produced no evidence that the overtime order was unreasonable. Therefore, the district court properly found that the order for Porter to work overtime was reasonable and the employer did not breach the collective bargaining agreement in terminating Porter's employment.

Accordingly, there was no reason to believe that the grievance would have to be sustained by an arbitrator. Therefore, the withdrawal of the grievance was entirely appropriate. The material allegations in Hernandez testimony in deposition and in his affidavit are undisputed and demonstrate that Hernandez thoroughly evaluated the merits of the grievance. He did not act arbitrarily, in bad faith or with hostility toward Porter. The district court properly found that there was no breach of the duty of fair representation.

In reviewing this record, the Fifth Circuit Court of Appeals correctly affirmed the district court's decision.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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